

**Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend NYSE Rules 7.31, 7.35, 7.35B, 7.35C, 98, and 104 Relating to the Closing Auction**

December 17, 2021.

I. Introduction

On September 3, 2021, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Rules 7.31 (Orders and Modifiers), 7.35 (General), 7.35B (DMM-Facilitated Closing Auctions), 7.35C (Exchange-Facilitated Auctions), 98 (Operation of a DMM Unit), and 104 (Dealings and Responsibilities of DMMs) relating to the Closing Auction. The proposed rule change was published for comment in the Federal Register on September 22, 2021.<sup>3</sup> The Commission has received one comment letter on the proposal.<sup>4</sup>

On November 1, 2021, the Commission extended the time period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to December 21, 2021.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposal.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 93037 (Sept. 16, 2021), 86 FR 52719 (Sept. 22, 2021) (SR-NYSE-2021-44) (“Notice”).

<sup>4</sup> See Anonymous Letter (Sept. 27, 2021).

<sup>5</sup> See Securities Exchange Act Release No. 93488 (Nov. 1, 2021), 86 FR 61352 (Nov. 5, 2021).

## II. Description of the Proposal<sup>6</sup>

The Exchange has proposed to amend NYSE Rules 7.31 (Orders and Modifiers), 7.35 (General), 7.35B (DMM-Facilitated Closing Auctions), 7.35C (Exchange-Facilitated Auctions), 98 (Operation of a DMM Unit), and 104 (Dealings and Responsibilities of DMMs) relating to the Closing Auction.<sup>7</sup>

### Proposed Amendments to NYSE Rules 7.31, 7.35, 7.35B, and 7.35C

The Exchange proposes to amend NYSE Rules 7.31, 7.35, and 7.35B to revise the DMM-facilitated Closing Auction process. According to the Exchange, the proposed changes would modify how the Closing Auction Price would be determined and how DMMs would be able to participate in the Closing Auction, but would not change DMMs' NYSE Rule 104 obligation to facilitate the Closing Auction, including to supply liquidity as needed. The Exchange asserts that the proposed changes would make the Closing Auction more transparent and deterministic, while still retaining the DMMs' unique obligation to facilitate the Closing Auction.<sup>8</sup>

The Exchange also proposes to make conforming changes to NYSE Rule 7.35C to revise the orders eligible to participate in Exchange-facilitated Closing Auctions.<sup>9</sup>

Proposed Changes to Closing Auction Price. The Exchange proposes to amend NYSE Rule 7.35B(g) to add explicit price parameters to the Closing Auction Price. Under current Exchange rules, the DMM is responsible for determining a Closing Auction Price that is able to satisfy all better-priced orders on the Side of the Imbalance. This requirement would not change. The Exchange proposes to add that the Closing Auction Price determined by the DMM must also be at a price that is at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price. The Exchange asserts that adding this proposed Closing Auction Price

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<sup>6</sup> For further details about the proposal, see the Notice, supra note 3.

<sup>7</sup> Capitalized terms used in connection with Auctions on the Exchange are defined in NYSE Rule 7.35(a). See Notice, supra note 3, 86 FR 52719 n.4.

<sup>8</sup> See id. at 52720.

<sup>9</sup> See id.

parameter is consistent with how the Closing Auction Price has been determined for the vast majority of Closing Auctions and that, in the period January 1, 2021 to July 23, 2021, 96.5% of all Closing Auctions were priced at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price, and, during this same period, 94.9% of closing auction volume priced within these parameters.<sup>10</sup> The Exchange further asserts that this proposed change would eliminate any potential for a Closing Auction Price to be lower (higher) than the last-published Imbalance Reference Price in the case of a Buy (Sell) Imbalance. The Exchange further asserts that this proposed change would also promote transparency and determinism with respect to the Closing Auction because the Closing Auction Price would be required to be within a pre-determined range of prices that have been disseminated via the Closing Auction Imbalance Information and that cannot be changed after the end of Core Trading Hours.<sup>11</sup>

Proposed Changes to How DMMs Would Participate in the Closing Auction. The Exchange proposes to change how DMMs would be able to enter buy and sell interest to participate in the Closing Auction by limiting the circumstances of when a DMM could enter or cancel interest after the end of Core Trading Hours.<sup>12</sup>

Currently, NYSE Rule 7.35B(a)(2) provides that a DMM may enter or cancel DMM Interest after the end of Core Trading Hours in order to supply liquidity as needed to meet the DMM's obligation to facilitate the Closing Auction in a fair and orderly manner. The Exchange states that, consistent with this current NYSE Rule, it does not block a DMM from entering or canceling DMM Interest after the end of Core Trading Hours. Instead, according to the Exchange, the DMM's determination of whether to enter or cancel DMM Interest after the end or

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<sup>10</sup> See id. at 52720.

<sup>11</sup> According to the Exchange, the only circumstance in which the Continuous Book Clearing Price could change after the end of Core Trading Hours would be if NYSE Rule 7.35B(j)(2)(A), described below, were invoked and the requirement to enter all order instructions by the end of Core Trading Hours were temporarily suspended for a security. See id. at 52721.

<sup>12</sup> See id.

Core Trading Hours is subject to the DMM's obligation to maintain a fair and orderly market, as specified in Rule 104.<sup>13</sup>

The Exchange proposes to amend NYSE Rule 7.35B(a)(2) to provide that after the end of Core Trading Hours, a DMM may enter only DMM Auction Liquidity and only if such interest would offset any Unpaired Quantity at the Closing Auction Price. With this change, the Exchange states, DMMs would be systematically restricted with respect to the side, price, and quantity of the DMM Auction Liquidity that they may enter after the end of Core Trading Hours. According to the Exchange, because DMM Auction Liquidity would have priority over at-priced Yielding Orders (described in more detail below), the Exchange further proposes that offsetting at-priced Yielding Orders would not be included in the calculation of the Unpaired Quantity that a DMM may offset with DMM Auction Liquidity. With these proposed changes, the Exchange states, a DMM could enter DMM Auction Liquidity after the end of Core Trading Hours only to close a security at a price that is at or closer to the Imbalance Reference Price than the published Continuous Book Clearing Price.<sup>14</sup> The Exchange proposes to systematically enforce this new requirement and block any DMM buy and sell interest that does not meet these new requirements.<sup>15</sup>

The Exchange states that it proposes to cancel DMM Orders (i.e., DMM buy and sell orders resting on the Exchange Book) at the end of Core Trading Hours because it also proposes

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<sup>13</sup> See id.

<sup>14</sup> The Exchange has provided the following example. If there is an Imbalance to buy, the Imbalance Reference Price is \$10.00, and the Continuous Book Clearing Price is \$10.10, the DMM could enter DMM Auction Liquidity to sell only at prices ranging from \$10.10 to \$10.00 and only if there is Unpaired Quantity at such prices. If the DMM determines to close that security at \$10.03 and there is Unpaired Quantity to buy of 1,000 shares at that price (excluding at-priced offsetting Yielding Orders to sell), the DMM could enter DMM Auction Liquidity to sell up to only 1,000 shares. See id.

<sup>15</sup> See id.

that DMM Orders would not be eligible to participate in the Closing Auction.<sup>16</sup> Therefore, according to the Exchange, DMM Orders would not be included in the Auction Imbalance Information for the Closing Auction. The Exchange also proposes to eliminate the ability of a DMM to cancel any DMM Interest after the end of Core Trading Hours.<sup>17</sup>

The Exchange states that with this proposed change to NYSE Rule 7.35B(a)(2), DMMs would have fewer tools available to manage the risk of the DMM leading into the Closing Auction, particularly since their DMM Orders would automatically be canceled before the Closing Auction and they would be systematically restricted with respect to the side, price, and quantity of DMM Auction Liquidity that they may enter after the end of Core Trading Hours. The Exchange also states that, as required by their obligations in Rule 104, in connection with the Closing Auction, DMMs would still be required to contribute their own capital to supply liquidity as needed to assist in the maintenance of a fair and orderly market. In addition, according to the Exchange DMMs would continue to have an obligation with respect to determining a Closing Auction Price that satisfies all better-priced orders on the Side of the Imbalance.<sup>18</sup>

The Exchange states that, in recognition of both the continued obligations of DMMs with respect to the Closing Auction and their ongoing need to manage the risk of the DMM leading into the Closing Auction, it proposes to provide DMMs with different tools to participate in the Closing Auction. Specifically, the Exchange proposes to make the existing Closing D Order type available to DMMs. Currently, according to the Exchange, only Floor brokers may enter Closing D Orders. The Exchange states that, to enable DMMs to enter Closing D Orders, it proposes to

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<sup>16</sup> The Exchange also proposes to amend NYSE Rule 7.35B(j)(2)(A)(iii) to provide that DMM Orders would be rejected if entered after the end of Core Trading Hours (i.e., during the “Solicitation Period”) to offset an extreme order imbalance at or near the close. See id.

<sup>17</sup> See id.

<sup>18</sup> See id.

amend NYSE Rule 7.31(c)(2)(C)(i) to provide that a Closing D Order may be entered only by a Floor broker or DMM. The Exchange proposes that Closing D Orders would function for DMMs in a similar manner as they currently function for Floor brokers, with the following differences:

First, the Exchange would not offer the Yielding Modifier to DMMs, and therefore a Closing D Order entered by the DMM could not include a Yielding Modifier.<sup>19</sup> The Exchange proposes to amend NYSE Rule 7.31(c)(2)(C)(iii) to add the clause “entered by a Floor broker” to make clear that adding a Yielding Modifier to a Closing D Order would be available only to Floor brokers.<sup>20</sup>

Second, the Exchange proposes that, unlike Closing D Orders in NYSE-listed securities entered by a Floor broker, Closing D Orders entered by a DMM in NYSE-listed securities would not be able to participate in a Core Open Auction or Trading Halt Auction.<sup>21</sup> The Exchange states that, as currently set forth in NYSE Rule 7.31(c)(2)(C)(ii), on arrival, a Closing D Order is processed as a Limit Order and may trade or route prior to the Closing Auction, which, according to the Exchange, means that such orders are eligible to trade both in continuous trading and in Auctions prior to the Closing Auction. The Exchange states that, because the purpose of providing Closing D Orders to DMMs is to provide them with a tool to participate in Closing Auctions, the Exchange does not believe that Closing D Orders entered by DMMs in NYSE-

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<sup>19</sup> According to the Exchange, the Yielding Modifier is not necessary for DMMs because their transactions on the Exchange are as a dealer acting in the capacity as a market maker, and they are therefore not subject to the trading prohibitions specified in Section 11(a) of the Act. 15 U.S.C. 78k(a)(1) and 15 U.S.C. 78k(a)(1)(i). See id.

<sup>20</sup> See id.

<sup>21</sup> The Exchange states that it does not propose this difference for Closing D Orders entered by DMMs in UTP Securities as such orders would be routed for participation in an opening or reopening auction on the primary listing market and DMMs would not have a unique role in those auctions. The Exchange states that, by contrast, because DMMs have a parity allocation in Core Open Auctions and Trading Halt Auctions, the Exchange believes it would simplify Exchange rules to provide that such orders would not participate in Exchange Core Open and Trading Halt Auctions. See id. at 52722.

listed securities would need to participate in a Core Open Auction or Trading Halt Auction on the Exchange.<sup>22</sup>

The Exchange states that the reason it would accept, or not cancel, a Closing D Order entered by a DMM in the last ten minutes of trading is that, as provided for in NYSE Rule 7.35(d), the Exchange will not open or reopen a security that has not yet opened or is halted or paused and will not transition to continuous trading if such opening or reopening would be in the last ten minutes of trading before the end of Core Trading Hours. The Exchange states that it will remain unopened, halted, or paused and will close the security as provided for in the NYSE Rule 7.35 Series. Because in these circumstances, the Exchange would proceed to a Closing Auction, the Exchange proposes to accept (or not cancel) Closing D Orders entered by DMMs in NYSE-listed securities during this ten-minute period, even if the security is in a halt state during that period.<sup>23</sup>

According to the Exchange, except for these differences, Closing D Orders entered by DMMs would function the same as they do for Floor brokers, including that:

- Entry of such orders can begin at 6:30 a.m. (NYSE Rule 7.34(a)(1)).
- Such orders can be entered in any securities trading on the Exchange, including a UTP Security,<sup>24</sup> and the DMM can provide instruction of whether a Closing D Order in a UTP Security would be routed to the primary listing market as either a MOC or LOC Order (NYSE Rule 7.31(c)(2)(iv)).
- Such orders would be included in the Closing Auction Imbalance Information at their undisplayed discretionary price beginning five minutes before the end of Core Trading Hours (NYSE Rule 7.35(b)(1)(C)(ii)).

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<sup>22</sup> See id.

<sup>23</sup> See id.

<sup>24</sup> The term “UTP Security” is defined in NYSE Rule 1.1 to mean a security that is listed on a national securities exchange other than the Exchange and that trades on the Exchange pursuant to unlisted trading privileges. See id.

- Beginning 10 seconds before the scheduled close of trading, a request to enter a Closing D Order in any security or to cancel, cancel and replace, or modify such order in an Auction-Eligible Security would be rejected (NYSE Rule 7.35B(f)(3)).<sup>25</sup>

The Exchange further proposes to exclude Closing D Orders entered by a DMM from the definition of “DMM Orders” in NYSE Rule 7.35(a)(9)(B). The Exchange states that, with this change, the proposed reference to DMM Orders in the amendment to NYSE Rule 7.35B(a)(2) would not include Closing D Orders, and therefore, Closing D Orders entered by a DMM would not be canceled at the end of Core Trading Hours. The Exchange also proposes a clarifying change to NYSE Rule 7.35(a)(9)(C) to provide that DMM After-Auction Orders means “DMM Orders,” and not just “orders.” With this change, according to the Exchange, the definition of DMM After-Auction Orders would similarly not include Closing D Orders entered by a DMM. The Exchange also proposes to delete the phrase “as defined under Rule 7.31” in NYSE Rule 7.35(a)(9)(C) as unnecessary because the defined term “DMM Orders” already references NYSE Rule 7.31.<sup>26</sup>

The Exchange asserts that providing DMMs with the ability to enter Closing D Orders in their assigned securities would provide them with a replacement mechanism both to supply liquidity as needed for the Closing Auction, as required by Rule 104(a)(3), and to manage the risk of the DMM leading into the Closing Auction, in a manner that is more transparent and deterministic than the current process. The Exchange proposes that Closing D Orders entered by a DMM would be included in the Closing Auction Imbalance Information at their undisplayed discretionary price beginning five minutes before the end of Core Trading Hours, which is when Closing D Orders entered by Floor brokers are included in the Closing Auction Imbalance Information.<sup>27</sup> With this change, according to the Exchange, Closing D Orders entered by DMMs

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<sup>25</sup> See id.

<sup>26</sup> See id.

<sup>27</sup> See id. (citing NYSE Rule 7.35(b)(1)(C)(ii)).



would be reflected in the Closing Auction Imbalance Information, which is not the case for DMM Interest currently entered or canceled after the end of Core Trading Hours. The Exchange states that market participants would be able to respond to any changes in the Closing Auction Imbalance Information that may result from Closing D Orders entered by DMMs by entering interest into the continuous order book or retaining the services of a Floor broker to enter Closing D Orders on their behalf.<sup>28</sup>

According to the Exchange, because Closing D Orders entered by DMMs would function similarly to Closing D Orders entered by Floor brokers, and would not be permitted to be entered or canceled in the last ten seconds of trading, the manner by which the Continuous Book Clearing Price would be determined would be the same as today and would not change in the last ten seconds due to the entry of a Closing D Order. The Exchange also states that, because DMMs could not enter or cancel any new interest after the end of Core Trading Hours (other than offsetting interest), the potential range of Closing Auction Prices would no longer be able to be changed by a DMM after the end of Core Trading Hours.<sup>29</sup>

The Exchange further asserts that providing DMMs with the ability to enter Closing D Orders in all securities that trade on the Exchange, including UTP Securities, would generally support the maintenance of a fair and orderly market in securities traded on the Exchange by providing for a mechanism for DMMs to enter such orders directly. Currently, according to the Exchange, a DMM may choose to use a Floor broker to enter Closing D Orders in securities that have not been assigned to that DMM. The Exchange asserts that allowing DMMs to enter Closing D Orders directly would reduce operational complexity and cost for DMMs, thereby creating an incentive for additional firms to register as a DMM. The Exchange asserts that this

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<sup>28</sup> The Exchange states that, as today, the Closing Auction Imbalance Information would not identify the source of orders included in the Continuous Book Clearing Price, including whether an order is entered by a DMM, Floor broker, or other member organization. See id.

<sup>29</sup> See id.

proposed change would also make it easier for regulatory staff to monitor DMM trading activity on the Exchange.<sup>30</sup>

The Exchange also asserts that providing DMMs with the ability to enter Closing D Orders in all securities that trade on the Exchange would serve as an incentive for additional broker-dealers to register as a DMM on the Exchange. The Exchange states that, currently, there are numerous costs associated with becoming a DMM. For example, according to the Exchange, before being approved to operate as a DMM, among other things, a firm must develop and implement DMM-specific technology designed to interface with Exchange systems consistent with the obligations under NYSE Rule 104 (e.g., to maintain depth and continuity in assigned securities and to facilitate Auctions both manually and electronically); hire, train, and maintain staff on the Trading Floor; and develop and implement policies and procedures and surveillances designed to comply with DMM-specific rules (e.g., NYSE Rules 36, 98, and 104).<sup>31</sup> The Exchange states that it understands that in the past, to justify incurring such upfront costs, firms would not register as a DMM firm unless they had certainty that once they started operations as a DMM, they would have had a roster of listed securities allocated to the firm. The Exchange states that, in the past, this has been achieved by a new entrant acquiring an existing DMM firm, with the new firm being allocated the listed securities previously allocated to the acquired firm. The Exchange asserts that, the absence of such opportunities, which would arise only if an existing firm seeks to exit the DMM business, providing potential new DMM entrants with additional opportunities to provide liquidity across all securities that trade on the Exchange may serve as an incentive for new entrants to undertake the costs to register as a DMM unit without a

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<sup>30</sup> See id.

<sup>31</sup> Pursuant to NYSE Rule 98(c)(1), to operate a DMM unit, a member organization must obtain approval from the Exchange. To obtain approval, among other things, the DMM unit must maintain and enforce written policies and procedures consistent with NYSE Rule 98 requirements relating both to protecting material non-public information generally, and more specifically to protecting against the misuse of Floor-based non-public order information.

significant roster of allocated securities. The Exchange asserts that additional DMMs would promote diversity of DMMs on the Exchange, providing greater choice to issuers when selecting the DMM that would be assigned to their securities.<sup>32</sup>

DMM Interest Allocation in the Closing Auction. The Exchange states that, because of the changes to what type of DMM interest would be eligible to participate in a Closing Auction, it proposes to change how much such DMM Interest would be allocated in a Closing Auction, as described in NYSE Rule 7.35B(h), as follows:

First, the Exchange proposes to amend NYSE Rule 7.35B(h)(1) to provide that better-priced Closing D Orders – whether entered by a Floor broker or a DMM – would be guaranteed to participate in the Closing Auction (subject to DMM allocation self-trade prevention, described below). The Exchange asserts that because DMMs would be entering Closing D Orders before the end of Core Trading Hours and such interest would be included in the Closing Auction Imbalance Information, if they are better-priced orders, they should be included in the Closing Auction in the same manner that all other better-priced orders entered by other member organizations are allocated in the Closing Auction. The Exchange states that it does not consider this a benefit for DMMs because all better-priced interest is guaranteed to participate in the Closing Auction.<sup>33</sup> Therefore, according to the Exchange, DMMs would not receive a different allocation opportunity from other participants for such better-priced Closing D Orders.

Second, the Exchange proposes to amend NYSE Rule 7.35B(h)(2)(A) to provide that at-priced Closing D Orders entered by a DMM in securities that are assigned to that DMM would be included in the DMM Participant<sup>34</sup> for purposes of a parity allocation. NYSE Rule 7.35B(h)(2) currently provides that at-priced orders and DMM Interest of any price are not

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<sup>32</sup> See id. at 52723.

<sup>33</sup> See id.

<sup>34</sup> Under NYSE Rule 7.36(a)(5), the term “DMM Participant” means the DMM assigned to the security. Accordingly, a DMM is eligible for a DMM Participant parity allocation only in securities assigned to that DMM. See id.

guaranteed to participate in the Closing Auction. The Exchange proposes that at-priced Closing D Orders would also not be guaranteed to participate in the Closing Auction. In addition, current NYSE Rule 7.35B(h)(2)(A) further provides that orders ranked Priority 2 – Display Orders, which include DMM Interest, are ranked on parity by Participant pursuant to NYSE Rule 7.37(b)(2)–(7). Accordingly, currently, at-priced DMM Interest is allocated on parity by DMM Participant in the Closing Auction. The Exchange states that it therefore believes that ranking at-priced Closing D Orders entered by a DMM in its assigned securities on parity by DMM Participant would not be novel. The Exchange states that the distinction from current rules, however, would be that Closing D Orders would be required to be entered before the end of Core Trading Hours. The Exchange states that by contrast, under the current rules, DMMs could receive a parity allocation of at-priced DMM Interest entered after the end of Core Trading Hours.<sup>35</sup>

In addition, proposed NYSE Rule 7.35B(h)(2)(A) would provide that at-priced Closing D Orders entered by a DMM in securities not assigned to that DMM would be included in the Book Participant. The Exchange states that this allocation methodology would be new because, currently, a member organization acting in its capacity as a DMM is not permitted to enter orders in securities that are not assigned to it. The Exchange states that, because a member organization entering orders in NYSE-listed securities not assigned to it in its capacity as a DMM would not be functioning as a DMM, the Exchange proposes that such at-priced Closing D Orders be included in the Book Participant<sup>36</sup> for purposes of parity allocations in the Closing Auction.<sup>37</sup>

Third, the Exchange proposes to amend Rule 7.35B(h)(2) to add new subparagraph (E) providing that DMM Auction Liquidity, i.e., the offsetting interest that a DMM would be

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<sup>35</sup> See id.

<sup>36</sup> Under NYSE Rule 7.36(a)(5), the term “Book Participant” means orders collectively represented in the Exchange Book that have not been entered by a Floor broker or DMM. Pursuant to NYSE Rule 7.37(b)(5), an allocation to the Book Participant will be allocated to orders that comprise the Book Participant by working time. See id.

<sup>37</sup> See id.

permitted to enter after the end of Core Trading Hours in connection with facilitating the Closing Auction and that would always be at-priced interest, would be allocated after both LOC Orders and Closing IO Orders.<sup>38</sup> The Exchange states that this would be new because currently, all at-priced DMM Interest, including that entered after the end of Core Trading Hours, would be allocated before at-priced LOC Orders and Closing IO Orders. As described above, the Exchange proposes that only at-priced interest entered by a DMM before the end of Core Trading Hours, i.e., Closing D Orders, would be allocated before LOC Orders and Closing IO Orders. According to the Exchange, that would not be a unique benefit because currently, all displayed and non-displayed orders, including Closing D Orders entered by Floor brokers, are allocated before LOC Orders and Closing IO Orders. The Exchange states that, accordingly, DMMs would not receive a unique benefit with this allocation sequence.<sup>39</sup>

As proposed, DMM Auction Liquidity, which can be entered only after the end of Core Trading Hours, would be allocated after the following at-priced orders have any opportunity to participate in the Closing Auction: orders ranked Priority 2 – Displayed Orders and Closing D Orders; orders ranked Priority 3 – Non-Display Orders; LOC Orders; and Closing IO Orders. As further proposed, among at-priced orders, DMM Auction Liquidity would receive an allocation opportunity before orders ranked Priority 4 – Yielding Orders and Closing D Orders with a Yielding Modifier. The Exchange asserts that this allocation would be consistent with a fair and orderly market because orders with a Yielding Modifier are, by their terms, conditional, intended to yield to other available interest, and not guaranteed an execution in the Closing Auction.<sup>40</sup>

The Exchange states that, because DMM Auction Liquidity would be allocated ahead of Yielding Orders, the Exchange would not include offsetting at-priced Yielding Orders in the

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<sup>38</sup> The Exchange proposes a non-substantive amendment to re-number current NYSE Rules 7.35B(h)(2)(E) and (F) as proposed NYSE Rules 7.35B(h)(2)(F) and (G). See id.

<sup>39</sup> See id.

<sup>40</sup> See id. at 52723–24.

calculation of the Unpaired Quantity that would be provided to DMMs to let them know the full quantity of DMM Auction Liquidity that they would be eligible to trade at a price point. The Exchange further states that, because it proposes to change how DMM Auction Liquidity would be ranked and allocated in a Closing Auction, it proposes to amend the second sentence of NYSE Rule 7.35(a)(9)(A)<sup>41</sup> to specify that the ranking and allocation of DMM Auction Liquidity, as described in that Rule, would be applicable only for a Core Open Auction or Trading Halt Auction.<sup>42</sup>

Finally, the Exchange proposes to amend NYSE Rule 7.35B(h)(3)(A) relating to DMM Participant allocation. The current rule addresses how DMM Orders would be allocated within the DMM Participant.<sup>43</sup> The Exchange states that, because DMM Orders would no longer participate in the Closing Auction, it proposes to delete the current rule text. The Exchange proposes that Rule 7.35B(h)(3)(A) would instead address how the Exchange would apply self-trade prevention within the DMM Participant Allocation.<sup>44</sup>

The Exchange states that a DMM would not be able to enter or cancel Closing D Orders in the last ten seconds of Core Trading Hours. In addition, according to the Exchange DMMs would be permitted to enter DMM Auction Liquidity only after the end of Core Trading Hours, and only to offset Unpaired Quantity at the Closing Auction Price. Accordingly, the Exchange states, it could be possible that a DMM has a Closing D Order to buy (sell) that is eligible to participate in the Closing Auction when there is a buy (sell) Unpaired Quantity, and therefore the

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<sup>41</sup> The second sentence of NYSE Rule 7.35(a)(9)(A) currently provides that “[f]or purposes of ranking and allocation in an Auction, DMM Auction Liquidity is ranked Priority 2 - Display Orders.” See id. at 52724.

<sup>42</sup> See id.

<sup>43</sup> Current NYSE Rule 7.35B(h)(3)(A) provides: “At-priced DMM Orders will be placed on the allocation wheel for the Closing Auction based on the time of entry and any other orders or interest from such DMM will join that position on the allocation wheel. If the only DMM Interest available to participate in a Closing Auction is DMM Auction Liquidity or better priced DMM Orders or both, such DMM Interest will be placed last on the allocation wheel.” See id.

<sup>44</sup> See id.

DMM may be entering offsetting DMM Auction Liquidity to sell (buy). If the prices of two such contra-side orders either lock or cross, the Exchange proposes to apply STP Decrement and Cancel (“STPD”), as described in NYSE Rule 7.31(i)(2)(C)(i), to such locking/crossing interest.<sup>45</sup> The Exchange asserts that by applying STPD, the Exchange would systematically ensure that DMM Auction Liquidity would not trade in a Closing Auction where there are also contra-side Closing D Orders entered by the DMM.<sup>46</sup> According to the Exchange, this would also ensure that only the equivalent size of the two orders would be canceled. Therefore, the Exchange asserts, such cancellation would have minimal impact on how the Closing Auction Price would be determined. The Exchange further proposes that if there is more than one Closing D order to sell (buy) to be canceled, such orders would be canceled in price/time sequence, from lowest (highest) price first, and then at each price, from oldest to newest.<sup>47</sup>

Exchange-Facilitated Auctions. NYSE Rule 7.35C(a)(1) currently provides that if the Exchange facilitates an Auction, DMM Interest will not be eligible to participate if such Auction results in a trade and will be eligible to participate if such Auction results in a quote. The Exchange proposes that because, as described above, Closing D Orders entered by DMMs would

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<sup>45</sup> Under NYSE Rule 7.31(i)(2)(C)(i), STPD works as follows: “if both orders are equivalent in size, both orders will be cancelled back to the originating member organization. If the orders are not equivalent in size, the equivalent size will be cancelled back to the originating Client ID and the larger order will be decremented by the size of the smaller order with the balance remaining on the Exchange Book.” See id.

<sup>46</sup> According to the Exchange, the STPD functionality would be implemented for DMMs as a tool to help enable them to meet their obligations to facilitate the Closing Auction in a fair and orderly manner while systematically preventing the DMM from engaging in certain trading activity such as “wash sales.” The Exchange states that it does not propose to implement self-trade prevention for all market participants in the Closing Auction, rather only for the limited case of DMM Auction Liquidity entered after the end of Core Trading Hours. According to the Exchange, because the Closing Auction is a single transaction involving many different participants at a single clearing price, it would be difficult to implement this functionality from a technological and operational perspective across multiple parties and all other types of auction interest because it would require the Exchange to continually provisionally cancel and recalculate the prospective auction. See id.

<sup>47</sup> See id.

be processed similarly to Floor broker Closing D Orders, including that they would be included in Closing Auction Imbalance Information, Closing D Orders entered by a DMM be processed similarly to Closing D Orders entered by Floor brokers in an Exchange-facilitated Auction. The Exchange states that it accordingly proposes to amend Rule 7.35C(a)(1) to provide that Closing D Orders entered by a DMM would be eligible to participate in an Exchange-facilitated Closing Auction.<sup>48</sup>

#### Proposed Amendments to Rules 104 and 98

Prohibited Transactions. The Exchange states that, in connection with the above-described changes to the process for DMM-facilitated Closing Auctions, it proposes to amend Rule 104 to eliminate the current restriction on DMMs engaging in “Prohibited Transactions” during the last ten minutes of trading prior to the scheduled close of trading. The Exchange asserts that the proposed changes to the Closing Auction process obviate the need for this current restriction and the Exchange proposes to delete the text currently set forth in Rule 104(g)(1)(B) and subparagraph (i) thereto in its entirety.<sup>49</sup>

NYSE Rule 104(g)(1)(A) currently defines an “Aggressing Transaction” as a DMM unit transaction that: “(i) is a purchase (sale) that reaches across the market to trade as the contra-side to the Exchange published offer (bid); and (ii) is priced above (below) the last differently-priced trade on the Exchange and above (below) the last differently-priced published offer (bid) on the Exchange.” NYSE Rule 104(g)(1)(B) further provides that:

Aggressing Transactions during the last ten minutes prior to the scheduled close of trading that would result in a new high (low) price for a security on the Exchange for the day at the time of the DMM's transaction are prohibited, unless such transaction would match another market's better bid or offer price, bring the price of that security into parity

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<sup>48</sup> See id.

<sup>49</sup> See id.



with an underlying or related security or asset, or would liquidate or decrease the position of the DMM unit.<sup>50</sup>

These are referred to as “Prohibited Transactions.”<sup>51</sup>

The Exchange states that, since 2017, it has implemented changes relating to trading functions on the Exchange leading into the Closing Auction that have altered the balance of DMM obligations against the benefits provided to DMMs. The Exchange states that, first, in 2019, in connection with the transition to the Pillar trading platform, it amended its rules to provide that Floor Broker Interest (i.e., interest verbalized in the trading crowd by a Floor Broker) would be included in Closing Auction Imbalance Information.<sup>52</sup> The Exchange states that, accordingly, from August 2019, when Pillar was implemented, until March 2020, when the Trading Floor was temporarily closed as a precaution to prevent the spread of COVID-19, the information available to DMMs regarding Floor Broker Interest became available to subscribers of the Closing Auction Imbalance Feed.

Second, according to the Exchange, beginning in 2020, it temporarily suspended the availability of Floor Broker Interest to be eligible to participate in the Closing Auction.<sup>53</sup> The Exchange recently amended its rules to permanently exclude Floor Broker Interest from the

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<sup>50</sup> NYSE Rule 104(g)(1)(B) defines the “position of the DMM unit” for purposes of NYSE Rule 104(g)(1)(B) as “the DMM unit’s inventory of securities exclusive of pending, unexecuted orders and has the same meaning as ‘net position information in DMM securities’ in Rule 98(c)(5).” See id.

<sup>51</sup> See id.

<sup>52</sup> See id. at 52725 (citing NYSE Rule 7.35B(a)(1)(B)).

<sup>53</sup> See Securities Exchange Act Release No. 89086 (June 17, 2020), (SR-NYSE-202-52) (Commentary .03 to Rule 7.35B was in effect on a temporary basis from June 17, 2020 until July 23, 2021, when the Commission approved proposed changes to Rule 7.35B that provide that Floor Broker Interest is no longer eligible to participate in the Closing Auction. The term “Floor Broker Interest” is defined in Rule 7.35(a)(10) to mean orders represented orally by a Floor broker at the point of sale. See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40886 (July 29, 2021) (SR-NYSE-2020-95) (“Floor Broker Interest Approval Order”). See also Notice, supra note 3, 86 FR 52725.

Closing Auction.<sup>54</sup> Because of the absence of Floor Broker Interest in the Closing Auction, any remaining information advantage that DMMs might have had with respect to orders from Floor brokers – even after such interest was included in the Closing Auction Imbalance Information – has since been eliminated. The Exchange asserts that, accordingly, one of the information advantages of DMMs that the Commission cited to in the Disapproval Order no longer exists.<sup>55</sup>

The Exchange asserts that this proposed rule change further alters the balance of DMM obligations compared to the benefits provided to DMMs with respect to the Closing Auction. The Exchange further asserts that in the aggregate, these changes (including the elimination of Floor Broker Interest) result in a shift that decreases the benefits available to DMMs without a commensurate decrease in obligations. Specifically, according to the Exchange, with this proposed rule change:

- DMMs must still meet their NYSE Rule 104 obligation to facilitate the Closing Auction and supply liquidity as needed. They must also select an Auction Price that satisfies all better-priced orders on the Side of the Imbalance. However, they would now be systematically restricted as to the price range at which the Closing Auction Price could be determined. As proposed, if the Side of the Imbalance is to buy (sell), the Auction Price must be at or above (below) the last-published Imbalance Reference Price and not above (below) the last-published non-zero Continuous Book Clearing Price. Accordingly, with this proposed change, DMMs will be subject to a further limitation on how they may select the Closing Auction Price. By contrast, under current rules, there is no express requirement for a DMM to close a stock within the Continuous Book Clearing Price, although DMMs are obligated to, among other things, supply liquidity as needed to facilitate the Closing Auction in a fair and orderly manner. This proposed change promotes transparency and determinism of the

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<sup>54</sup> See Floor Broker Interest Approval Order, supra note 55.

<sup>55</sup> See Notice, supra note 3, 86 FR 52725.

Closing Auction Price and systematically constrains how a DMM selects a Closing Auction Price. The Exchange therefore believes that this proposed change decreases the unique benefits granted to the DMMs without decreasing the obligations on the DMMs with respect to the Closing Auction.<sup>56</sup>

- The only interest that a DMM may enter after the end of Core Trading Hours to participate in the Closing Auction would be DMM Auction Liquidity, and such interest could be entered only to offset Unpaired Quantity at the Auction Price. Such interest is thus restricted by side, price, and quantity. By contrast, under current rules, DMMs have no systematic restrictions on entering or canceling DMM Interest after the end of Core Trading Hours. This change ensures that DMM Auction Liquidity could be used only to dampen significant price movements at the close. The Exchange believes this proposed change significantly decreases unique benefits to the DMMs because they would still be required to supply liquidity as needed to support a fair and orderly Closing Auction, but would have limited tools to enter any such interest after the end of Core Trading Hours. The Exchange proposes to make the Closing D Order available to DMMs in part to offset this reduction of unique benefits with respect to entering or canceling DMM Interest after the end of Core Trading Hours. However, unlike how DMMs currently may enter and cancel DMM Interest, DMMs would not receive any unique treatment with respect to the availability of this order type. To the contrary, Closing D Orders for DMMs would function similarly to Closing D Orders available to Floor brokers, including that they may not be entered or canceled in the last ten seconds of trading and the interest would be included in the Closing Auction Imbalance Information. Accordingly, the Exchange is not providing a bespoke tool for DMMs to supply liquidity for the Closing Auction. In addition, the

Exchange proposes to make Closing D Orders available for a wholly independent reason to provide an incentive for more broker-dealers to seek to register as a DMM, which would increase DMM diversity on the Exchange to increase issuer choice.<sup>57</sup>

- DMM Auction Liquidity entered in connection with facilitating the Closing Auction would, by its terms, be at-priced interest and would be allocated after at-priced displayed orders, non-displayed orders, LOC Orders, and Closing IO Orders. Accordingly, unlike at-priced DMM Interest under current Rules, it would not have priority over LOC Orders and Closing IO Orders. While such DMM Auction Liquidity would have priority over orders with a Yielding Modifier, the Exchange notes that such orders are, by their terms, conditional in nature and designed to yield to other orders. Accordingly, DMMs would have a reduced benefit in connection with Closing Auction allocations for their at-priced DMM Auction Liquidity. The Exchange notes that the proposed allocation of Closing D Orders entered by the DMM would not provide them with a unique benefit because they would function similarly to Closing D Orders entered by Floor brokers. Accordingly, if a Closing D Order is better-priced, it would be guaranteed to participate in the Closing Auction (subject to DMM-specific self-trade prevention), just as any other better-priced interest would be guaranteed an allocation. In addition, that information would be transparent because such Closing D Orders would be included in Closing Auction Imbalance Information. DMMs would therefore not be receiving a unique benefit in this allocation. The Exchange further believes it is appropriate that at-priced DMM-entered Closing D Orders in their assigned securities would be allocated on parity as part of the DMM Participant because DMMs would continue to have a significant obligation with respect to the Closing Auction, and the benefit associated with a

parity allocation for such orders is designed to offset that obligation, in part. The Exchange would not propose the same benefit for Closing D Orders entered by a DMM in securities that are not assigned to the DMM; in such case, such orders would be included in the Book Participant, and therefore would not receive any allocation priority over other market participants.<sup>58</sup>

According to the Exchange, DMMs would continue to have benefits in connection with their unique role. For example, states the Exchange, at the point of sale, DMMs have access to aggregated buying and selling interest that is eligible to participate in the Closing Auction.<sup>59</sup> The Exchange states that, however, pursuant to current Rule 104(h)(ii), a DMM may not use any information provided by Exchange systems in a manner that would violate Exchange rules or federal securities laws or regulations. In addition, according to the Exchange, pursuant to current Rule 104(h)(iii), Floor brokers may request that a DMM provide them with the information that is available to the DMM at the post, including such aggregated buying and selling interest for the Closing Auction. The Exchange states that it continues to believe that it benefits the trading community as a whole to continue to make such information available to DMMs because Floor brokers who request such market looks can use that information to provide their customers with information necessary for them to make trading decisions leading into the close.<sup>60</sup>

The Exchange asserts that providing Closing D Orders to DMMs would also provide them with a benefit, but that this benefit would not be unique to DMMs, as this order type is also available to Floor brokers. According to the Exchange, because all Floor brokers operate on an agency-only basis, any market participant can avail themselves of Floor broker services and use Closing D Orders. The Exchange also asserts that providing Closing D Orders to DMMs is

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<sup>58</sup> See id. at 52725–26.

<sup>59</sup> The Exchange states that DMM unit algorithms are not provided aggregated buying and selling interest for the Closing Auction until after the end of Core Trading Hours. See id. at 52726.

<sup>60</sup> See id.

designed to offset the current significant barriers to entry for new DMM firms on the Exchange, which is an obligation independent of the obligations related to the Closing Auction.<sup>61</sup>

The Exchange asserts that, in the aggregate, the above-described changes have altered the balance of benefits and obligations for DMMs and the resulting scope of obligations would no longer be commensurate with DMM benefits. For example, according to the Exchange, DMMs no longer have an informational advantage relating to Floor broker verbal interest at the close and their at-priced DMM Auction Liquidity would no longer have priority over LOC or Closing IO Orders.<sup>62</sup>

The Exchange asserts that as a result of these significant alterations to DMM obligations and benefits, any current need for Prohibited Transactions as a DMM obligation has been obviated. The Exchange asserts that Prohibited Transactions make sense when a DMM has discretion over the Closing Auction Price and when a DMM can enter and cancel interest after the end of Core Trading Hours, but that, with the proposed changes described in this filing, DMM discretion is explicitly limited; the Closing Auction Price must be within a defined and transparent parameter that cannot be changed after the end of Core Trading Hours and DMMs would be limited in what offsetting interest they can enter after the end of Core Trading Hours. The Exchange asserts that while the DMM would still have an obligation to facilitate the Closing Auction and supply liquidity as needed, DMMs would no longer have the same discretion in how they fulfill this obligation. As a result, according to the Exchange, any trading activity that a DMM would engage in the last ten minutes of trading would be no different than how other market participants trade leading into the close.<sup>63</sup>

Because the Exchange proposes to eliminate Prohibited Transactions, the Exchange proposes to make a conforming amendment to NYSE Rule 98 to delete subparagraphs (c)(5) and

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<sup>61</sup> See id.

<sup>62</sup> See id.

<sup>63</sup> See id.

(c)(5)(A) and renumber subparagraphs (c)(6) and (c)(7) as (c)(5) and (c)(6). The Exchange states that it added NYSE Rule 98(c)(5) for the sole purpose of requiring DMMs to provide net position information in connection with monitoring their compliance with Prohibited Transactions.<sup>64</sup> Accordingly, the Exchange asserts, if Prohibited Transactions are eliminated, that reporting requirement becomes obsolete.<sup>65</sup>

Proposed Non-Substantive Amendments to NYSE Rule 104. In addition to eliminating prohibited transactions, the Exchange proposes to amend NYSE Rule 104 to eliminate rule text it describes as obsolete, to update rule references, and to make other conforming changes, as follows:

- The Exchange proposes to amend NYSE Rule 104(a)(2) to update the cross reference from NYSE Rule 123D to NYSE Rule 7.35A and to use the Pillar terms of “Core Open Auctions and Trading Halt Auctions” instead of referring to “openings.” The Exchange also proposes to delete the reference to NYSE Rule 13 and Reserve Order interest procedures at the opening as obsolete. Finally, the Exchange proposes to delete the reference to Supplementary Material .05 to NYSE Rule 104 with respect to odd-lot order information to the DMM unit algorithm, stating that this is also obsolete now that the Exchange trades on Pillar.<sup>66</sup>
- The Exchange proposes to amend NYSE Rule 104(a)(3) to update the cross reference from NYSE Rule 123C to NYSE Rule 7.35B and to use the Pillar term of “Closing Auctions” instead of “closes.” The Exchange also proposes to delete the reference to NYSE Rule 13 and Reserve Order interest procedures at the close as obsolete.<sup>67</sup>

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<sup>64</sup> See id. See also Securities Exchange Act Release No. 86131 (June 18, 2019), 84 FR 29565 (June 23, 2019) (SR-NYSE-2019-25) (Notice of filing and immediate effectiveness of proposed rule change).

<sup>65</sup> See Notice, supra note 3, 86 FR 52726.

<sup>66</sup> See id.

<sup>67</sup> See id.

- The Exchange proposes to amend NYSE Rule 104(b) by deleting subparagraphs (2) and (6) and replacing the text for NYSE Rule 104(b)(2) with the following: “Unless otherwise specified in Rule 7.31, DMM unit algorithms may use the orders and modifiers set forth in Rule 7.31.” NYSE Rule 104(b)(2) currently provides that “Exchange systems shall enforce the proper sequencing of incoming orders and algorithmically-generated messages and will prevent incoming DMM interest from trading with resting DMM interest. If the incoming DMM interest would trade with resting DMM interest only, the incoming DMM interest will be cancelled. If the incoming DMM interest would trade with interest other than DMM interest, the resting DMM interest will be cancelled.” The Exchange states that, since it transitioned to Pillar, it no longer enforces self-trade prevention on behalf of DMMs. Instead, according to the Exchange, DMMs may use one of the Self-Trade Prevention Modifiers (“STP”) described in NYSE Rule 7.31(i)(2).<sup>68</sup>

NYSE Rule 104(b)(6) currently provides that “DMM Units may not enter the following orders and modifiers: Market Orders, MOO Orders, CO Orders, MOC Orders, LOC Orders, or Buy Minus Zero Plus Instructions.” In the Pillar rules, NYSE Rule 7.31 sets forth which orders and modifiers are not available to DMMs, and the Exchange states that therefore NYSE Rule 104(b)(6) is obsolete. The Exchange asserts that the proposed new text for NYSE Rule 104(b)(2) would provide transparency and that NYSE Rule 7.31 would describe which orders and modifiers would be available to DMMs, including STP modifiers.

- The Exchange states that it proposes to amend NYSE Rule 104(b)(3) to delete references to “Floor broker agency interest files or reserve interest” as such references are now obsolete. The Exchange states that it no longer uses “Floor



broker agency interest files” and no longer provides Floor brokers with reserve interest functionality that differs from the Reserve Orders available to all member organizations, as described in NYSE Rule 7.31.<sup>69</sup>

- The Exchange proposes to amend NYSE Rule 104(b) by deleting subparagraph (4), which provides that “[t]he DMM unit’s algorithm may place within Exchange systems trading interest to be known as a “Capital Commitment Schedule.” (See Rule 1000 concerning the operation of the Capital Commitment Schedule).” With the transition to Pillar, the Exchange states that it has replaced the “Capital Commitment Schedule” with Capital Commitment Orders, as described in NYSE Rule 7.31(d)(5), and has deleted NYSE Rule 1000. Accordingly, the Exchange states, this current rule is obsolete. The Exchange proposes a non-substantive amendment to renumber Rule 104(b)(5) as Rule 104(b)(4).<sup>70</sup>
- The Exchange proposes to delete the text accompanying current NYSE Rules 104(c), (d), and (e) as obsolete now that the Exchange trades on Pillar.

NYSE Rule 104(c) currently provides: “A DMM unit may maintain reserve interest consistent with Exchange rules governing Reserve Orders. Such reserve interest is eligible for execution in manual transactions.” The Exchange states that NYSE Rule 7.31 now describes how Reserve Orders function.<sup>71</sup>

NYSE Rule 104(d) currently provides: “A DMM unit may provide algorithmically-generated price improvement to all or part of an incoming order that can be executed at or within the Exchange BBO through the use of Capital Commitment Schedule interest (see Rule 1000). Any orders eligible for execution in

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<sup>69</sup> See id. at 52727.

<sup>70</sup> See id.

<sup>71</sup> See id.

Exchange systems at the price of the DMM unit's interest will trade on parity with such interest, as will any displayed interest representing a d-Quote enabling such interest to trade at the same price as the DMM unit's interest." The Exchange states that, with Pillar, the Exchange has deleted Rule 1000 and no longer offers the Capital Commitment Schedule to DMMs.<sup>72</sup>

NYSE Rule 104(e) currently provides: "DMM units shall provide contra side liquidity as needed for the execution of odd-lot quantities that are eligible to be executed as part of the opening, re-opening and closing transactions but remain unpaired after the DMM has paired all other eligible round lot sized interest." According to the Exchange, this requirement is obsolete.<sup>73</sup>

With these proposed deletions, the Exchange proposes non-substantive amendments to renumber NYSE Rules 104(f), (g), (h), (i), and (j) as Rules 104(c), (d), (e), (f), and (g) and to update cross-references in proposed NYSE Rule 104(e)(iii) from subparagraph (h)(ii) and (iii) to (e)(ii) and (iii).<sup>74</sup>

- The Exchange proposes to amend current NYSE Rule 104(h)(ii) (proposed NYSE Rule 104(e)(ii)) to delete reference to information that is no longer available to a DMM at the post. Specifically, the Exchange states, it no longer provides DMMs at the post with the following information: "the price and size of any individual order or Floor broker agency interest file and the entering and clearing firm information for such order, except that the display shall exclude any order or portion thereof that a market participant has elected not

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<sup>72</sup> See id.

<sup>73</sup> See id.

<sup>74</sup> See id.

to display to a DMM.” Accordingly, the Exchange proposes to amend Rule 104(e)(ii) to delete that rule text.<sup>75</sup>

### III. Comments Received

The commenter generally agrees with the proposal.<sup>76</sup> The commenter supports efforts to address what the commenter describes as the ability of DMMs to manipulate “with impunity,” arguing that DMMs are allowed to alter closing prices and utilize aggressing transactions “solely for their own benefit,” which, according to the commenter, not only destabilizes the market, but also harms retail traders, pension funds, and small companies alike.<sup>77</sup>

The commenter, however, believes that the proposal contains a loophole, which is the Exchange’s proposal to accept and not cancel Closing D Orders entered by DMMs beginning ten minutes before the scheduled end of Core Trading Hours even if the security remains halted or pause or never opened, arguing that, if the objective is to reduce the power of DMM's and eliminate the possibilities for fraud and manipulation, such a blatant opportunity should not be left in place.<sup>78</sup>

### IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSE-2021-44 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>79</sup> to determine whether the proposal should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as

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<sup>75</sup> See id.

<sup>76</sup> See Anonymous Letter, supra note 4.

<sup>77</sup> Id.

<sup>78</sup> See id.

<sup>79</sup> 15 U.S.C. 78s(b)(2)(B).

described in greater detail below, the Commission encourages interested persons to provide additional comment on the proposal.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act,<sup>80</sup> which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, Section 6(b)(5) of the Act prohibits the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Further, Section 6(b)(9) of the Act requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate under the Act.<sup>81</sup>

The Exchange proposes, among other things, to: (1) require that the Closing Auction Price selected by a DMM when facilitating an auction must be between the Imbalance Reference Price and the Continuous Book Clearing Price; (2) allow DMMs to use Closing D Orders in assigned as well as non-assigned securities; (3) change various types of DMM trading interest would participate in the Closing Auction in assigned securities; and (4) eliminate the current NYSE rule provision that forbids DMMs from engaging in "Prohibited Transactions" during the last ten minutes of trading prior to the scheduled close of trading. Accordingly, the Commission seeks additional public comment on the following topics:

1. The Exchange argues that the proposed Closing Auction Price constraints would promote transparency and determinism with respect to the Closing Auction because the Closing Auction Price would be required to be within a pre-determined range of prices that have been

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<sup>80</sup> 15 U.S.C. 78f(b)(5).

<sup>81</sup> 15 U.S.C. 78f(b)(8).

disseminated via the Closing Auction Imbalance Information. The Exchange also represents that, from January 1, 2021, to July 23, 2021, 96.5% of all Closing Auctions, and 94.9% of all Closing Auction volume, occurred within the proposed parameters for the Closing Auction Price.<sup>82</sup>

Considering these statements by the Exchange, what are commenters' views on whether this proposal represents a significant constraint on how the Closing Auction Price is currently determined? Do commenters believe that an efficient Closing Auction Price is more likely to be identified through the use of the proposed Closing Auction Price constraints, and that the Exchange has sufficiently demonstrated this to be the case? Do commenters believe that the proposal might under some market conditions impede the efficient determination of an appropriate Closing Auction Price? What are commenters' views on whether the proposed Closing Auction Price constraints would support a fair and orderly market in securities listed on the Exchange? Do commenters believe that the statistics offered by the Exchange reflect a representative sample period?

2. Do commenters believe that any other aspect of the proposal represents a meaningful change from how Closing Auction Prices are currently determined by the DMM? Do commenters agree with the Exchange's assertion that the proposed mechanism for determining the Closing Auction Price "systematically constrains how a DMM selects a Closing Auction Price and thereby decreases the unique benefits granted to the DMMs," as the Exchange argues? Do commenters believe that the proposed Closing Auction Price parameters would impose an obligation on DMMs that is material? Do commenters believe that the proposed Closing Auction Price parameters would materially affect the balance of benefits and obligations of DMMs on the Exchange?

3. What are commenters' views on the proposal to permit DMMs to use the Closing D Order type, which is currently available exclusively to NYSE Floor brokers, who trade as

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<sup>82</sup> See Notice, supra note 3, 86 FR 52720.

agent on behalf of their customers? Do commenters believe that permitting DMMs to use Closing D Orders in their assigned securities represents a material change to the balance of benefits and obligations of DMMs? What are commenters' views of the arguments the Exchange has advanced in favor of extending the use of Closing D Orders to DMMs in their assigned securities? Do commenters believe that permitting DMMs to use Closing D Orders in their assigned securities is necessary in order for DMMs to be able to manage their risk while fulfilling their obligations under Exchange rules to facilitate the Closing Auction in their assigned securities? Do commenters believe that permitting DMMs to use Closing D Orders in their assigned securities is necessary in order for DMMs to be able to facilitate the Closing Auction within the proposed Closing Auction Price parameters? To what extent, if any, do commenters think that permitting DMMs to use Closing D Orders in assigned securities would give DMMs a competitive advantage over other market participants?

4. Do commenters believe that permitting DMMs to use Closing D Orders in NYSE listed securities other than their assigned securities and in UTP securities represents a material change to the balance of benefits and obligations of DMMs? To what extent, if any, do commenters think that permitting DMMs to use Closing D Orders in securities they have not been assigned would give DMMs a competitive advantage over other market participants? To what extent do DMMs currently make indirect use of Closing D Orders by routing those orders through NYSE Floor brokers? Would permitting DMMs to directly enter Closing D Orders in non-assigned securities meaningfully change the access that DMMs have to Closing D Orders or the cost to DMMs of using Closing D Orders? Would it have other effects on Exchange surveillance or on other Exchange participants? Do commenters believe that extending the use of Closing D Orders to DMMs outside their assigned securities would create a meaningful incentive for market participants to seek to become DMMs, and, if so, do commenters believe that this incentive would create any competitive effects that are not necessary or appropriate?

5. What are commenters' views on the proposed changes to the ways in which DMM trading interest would participate in the Closing Auction? Specifically, what are commenters' views on the proposed rule that all DMM interest, except for Closing D Orders, would no longer participate in the Closing Auction? What are commenters' view on the proposed rule that DMMs would be able to enter additional trading interest, in the form of DMM Auction Liquidity, after the end of Core Trading Hours only to offset unpaired interest at the Closing Auction Price? What are commenters' views on the way in which Closing D Orders entered by DMMs would be allocated executions in assigned securities and in other securities? Do commenters believe that this proposed rule would impose an obligation on DMMs that is material?

6. What are commenters' views on the proposed changes to the interest that will be reflected in the Exchange's disseminated Auction Imbalance Information? What are commenters' views on the way in which DMM Closing D Orders would be reflected in the Auction Imbalance Information, which would be different at different times leading into the Closing Auction?

7. What are commenters' views regarding the Exchange's proposal to eliminate the Prohibited Transactions provision of Rule 104? Do commenters believe that the current prohibition is necessary to maintain fair and orderly trading on the Exchange? Do commenters believe that the current prohibition impedes fair and orderly trading on the Exchange? Do commenters believe that past developments in the equities markets or changes to NYSE rules—or the other changes that the Exchange now proposes to make (for example, placing a constraint on the Closing Auction Price, or changing how DMM interest can participate in the Closing Auction)—are sufficient to address any concerns arising from permitting a DMM to trade aggressively in its assigned securities and set a new high or low for the day on the Exchange in

the last ten minutes of the Core Trading Session?<sup>83</sup> To what extent, if any, do commenters believe that the DMM's current re-entry obligations represent a meaningful constraint on DMMs that engage in Aggressing Transactions, as part of their obligation to maintain a fair and orderly market? Do commenters agree with the statement by the Exchange that, if Prohibited Transactions were eliminated as proposed, the DMM's re-entry obligations would suffice to effectively dampen any potential destabilizing impact of Aggressing Transactions made by DMMs during the last ten minutes of the trading day?

8. To what extent, if any, do commenters agree with the Exchange's statements that various changes that the Exchange has implemented since 2017, such as the public dissemination of floor broker interest from 2019 through 2020 and the exclusion of Floor broker interest from the Closing Auction beginning in 2020, have altered the balance of DMM obligations compared to the benefits provided to DMMs? To what extent do commenters agree with the Exchange's statement that, in the aggregate, this proposed rule change further alters the balance of DMM obligations compared to the benefits provided to DMMs with respect to the Closing Auction?

9. What effect, if any, do commenters believe the proposed rule changes, individually or collectively, might have on the ability or the motive of any market participants, including DMMs, to engage in manipulative behavior, either individually or in concert with other parties? What effect, if any, do commenters believe the proposed rule changes, individually or collectively, might have on the ability of the Exchange to detect and deter manipulative activity?

10. What are commenters' views on whether any aspect of the proposal would permit unfair discrimination between customers, issuers, brokers, or dealers? What are commenters'

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<sup>83</sup> See, e.g., Securities Exchange Act Release No. 81150 (July 1, 2017), 82 FR 33534, 33536–37 (July 20, 2017) (SR-NYSE-2016-71, SR-NYSEMKT-2016-99) (order disapproving proposal to remove Prohibited Transactions provisions of NYSE Rule 104).



views on whether any aspect of the proposal would impose any burden on competition that is not necessary or appropriate under the Act?

11. The Exchange states it proposes to make Closing D Orders available to DMMs to, among other things, provide an incentive for more broker-dealers to seek to register as a DMM. To what extent, if any, do commenters believe that increasing the number of new DMM entrants will be beneficial for execution quality or market quality?

12. Do commenters have any views on other aspects of the proposal?

#### V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5)<sup>84</sup> of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>85</sup> any request for an opportunity to make an oral presentation.<sup>86</sup>

Interested persons are invited to submit written data, views and arguments regarding whether the proposal should be disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

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<sup>84</sup> 15 U.S.C. 78f(b)(5).

<sup>85</sup> 17 CFR 240.19b-4.

<sup>86</sup> Rule 700(c)(2) of the Commission's Rules of Practice provides that "[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views." 17 CFR 201.700(c)(2).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2021-44 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Numbers SR-NYSE-2021-44. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposal that are filed with the Commission, and all written communications relating to the proposal between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of the Exchanges. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You

should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2021-44 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>87</sup>

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

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<sup>87</sup> 17 CFR 200.30–3(a)(57).